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CORRESPONDENCE.

Editor "Virginia Law Register:"

Within what time can a case be heard on an order of publication where the court or judge dispenses with publication thereof in a newspaper?

It is provided that, Code of Virginia, § 3230. "On affidavit that a defendant is a non-resident of this state, ——— an order of publication may be entered against him ——— Every order of publication under this section may be entered either by the court or by the clerk thereof in vacation.——"

It is further provided, that, Code, § 3231. "Every order of publication shall give the abbreviated style of the suit, state briefly its object, and require the defendants against whom it is entered, or the unknown parties, to appear within fifteen days after due publication thereof and do what is necessary to protect their interests. It shall be published once a week for four successive weeks in such newspaper as the court may prescribe, or, if none is prescribed, as the clerk may direct, and shall be posted by the clerk, at the front door of the courthouse of the county or corporation wherein the court is held, on or before the next succeeding rule day after it is entered; and the clerk shall file a certificate of the fact in the papers of the case; but the court, or judge thereof in vacation, may, in any case, if the court or judge deem it proper, dispense with such publication in a newspaper."

It will be seen from the above section that, in any case in which the court or judge thereof in vacation, dispenses with the publication of the order in a newspaper, the only publication of the order that is required, is the posting of the order (of course a copy of it), by the clerk, at the front door of the courthouse.

It is further provided within what time after the publication of the order a case may be tried or heard, by § 3232, as amended, Acts 1906, page 47: "When such order shall have been so executed, or when a copy of any process, or notice beginning any action, shall have been published as provided by any section of this chapter, if the defendants against whom it is entered, or published or the unknown parties, shall not appear within fifteen days after the completion of the execution of the order, or the expiration of the four weeks required for the completion of said publication, the case may be tried or heard as to them. ———" It will be seen that this section, 3232, as amended, embraces all cases under chapter 158 of the Code, in which chapter is included §§ 3525 and 3526 which provide for service of process on non-resident corporations, and trustees, lessees and receivers thereof, by publication of the process or notice, once a week for four successive weeks in a newspaper published in this state. But the question under consideration here is, when, under § 3231,

the publication of the order in a newspaper, has been dispensed with. As before stated, the only publication required in such case is the posting of the order at the front door of the courthouse by the clerk, on or before the rule day after it is entered. Therefore, when the order is thus posted, it follows that by the posting of it at the front door of the courthouse, as aforesaid, the execution of the order is completed, and that "if the defendant against whom it is entered, or the unknown parties, shall not appear within fifteen days thereafter," that is, within fifteen days after the order is posted by the clerk, the case may be tried or heard as to them.

The provision to dispense with the publication of an order of publication in a newspaper was adopted at the revisal of 1887, and its purpose was to facilitate the proceedings against non-residents, in a proper case, and prevent unnecessary delay. And as to what is a proper case, is left to the discretion of the court, or the judge thereof in vacation. Judge Burks, who was one of the revisors, said: "Undue delay in the administration of justice is always a just cause of complaint. It occurred to the revisors that more time than was necessary was given for maturing suits at rules in the clerks office for trial or hearing in court. The shortest time in which a suit could be matured (unless by consent) was generally two months. This was because two rule days were required for this purpose, and the rules were generally monthly. The law is changed so as to make the rules semi-monthly, and a case may therefore be now matured in one month or less time, from the institution of the suit." Burks' Address, Barton's Law Practice (2nd ed.) page 1389. When the court, or judge in vacation, dispenses with the publication of an order of publication in a newspaper, and the order has been posted at the front door of the courthouse, by the clerk, on or before the rule day after it is entered, the execution of the order is completed, the requirement of § 3232 is complied with and the case is ready to be tried or heard in fifteen days thereafter. In other words, the effect of the dispensing with the publication of the order in a newspaper is to enable a plaintiff to mature his suit against a non-resident defendant or unknown party within the same time that he can mature it against a home defendant by personal service of process, thus putting the non-resident and unknown parties upon the same footing as to time, as the home defendant.

JAMES H. GUTHRIE.

*Lynchburg, Va.,
December 16, 1910.*

This interpretation of the statute may, no doubt, be correct, and might prevail provided the court or judge exercised his discretion wisely in dispensing with such publication. And possibly such length of notice would be held sufficient as to non-resident defendants in contiguous states. But beyond that there would be serious danger

of infringing the due process clause of the Federal constitution. For example, it was held in *Roller v. Holly*, 176 U. S. 398, that where service of process was made upon a defendant residing in Virginia, requiring him to appear and answer a suit in Texas within five days, it is held that such notice was not a reasonable one, was not "due process of law" within the Fourteenth Amendment to the Constitution of the United States, and that a judgment obtained upon such notice was not binding upon the defendant. In this case Mr. Justice Brown, delivering the opinion of the United States Supreme Court, said: "That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose. What shall be deemed a reasonable notice admits of considerable doubt. * * * It may be said in general, with reference to these statutes (that is the statutes of the various states which the court sets out in its opinion) that in cases of publication notice is required to be given at least once a week for from four to eight weeks, and in case of personal service out of the state, no notice for less than twenty days between the service and return day is contemplated in any of the states except Mississippi, where a personal notice of ten days seems to be sufficient.

MISCELLANY.

The Decline in Trial by Jury.—It seems that the steady decline in the trial of civil causes by jury in the state, which was pointed out in our leading article last month, is also taking place in England. The *London Law Journal* asks:

Why is it that as the business of the County Courts grows the number of cases tried by juries decreases? Only 725 of the 897,042 actions tried in 1909 were tried by juries. This, 101 less than in the preceding year, is the lowest number on record. Some years back, when the number of actions determined was less than 500,000, the actions tried by juries numbered more than 1,000. On four circuits—the Newcastle, Leeds, Oswestry, and Bristol circuits—not a single action was tried with a jury during the whole of last year. On fifteen other circuits, including some of the most important towns in the country, the number of jury actions was less than five. Some judges, it may be, do not conceal their objection to trial by jury, and suitors and their advisers, of course, deem it imprudent to disregard the objection. The more probable reason for the decline in trial by